No. 77-526

In the Supreme Court of the United States

OCTOBER TERM, 1977

GEORGE A. CHITTY, PETITIONER

v.

UNITED STATES OF AMERICA

ROBERT M. POSTAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals in Postal's case (Pet. App. 1a-8a) is reported at 559 F. 2d 234. The opinion of the court of appeals in Chitty's case (Pet. App. 9a-17a) is not reported.

JURISDICTION

The judgment of the court of appeals in Chitty's case was entered on August 2, 1977. The judgment of the court of appeals in Postal's case was entered on August 30,

1977. The petition for writs of certiorari was filed on October 7, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners, grand jury witnesses who have been given use immunity, may refuse to testify because of their assertion that the testimony may incriminate them under the laws of Colombia.

STATEMENT

On April 22, 1977, petitioners were subpoenaed to testify before a federal grand jury sitting in the Southern District of Florida. The grand jury was investigating the possession, transportation and importation of 8,300 pounds of marijuana, which had been seized by the United States Coast Guard from a vessel in offshore waters. The seizure had led to the prosecution and conviction of petitioners for conspiracy to import marijuana; the grand jury wanted to pursue further leads and to investigate the possible involvement of other persons in the venture.[1]

On May 24, 1977, petitioner Chitty appeared before the grand jury. After acknowledging both that he and petitioner Postal were aboard the vessel at the time of the search and that he knew that there were "some 7,000 or so pounds of marijuana aboard the vessel," Chitty invoked

[1]The grand jury that subpoenaed petitioners had previously indicted petitioners and Salem Forsythe for importation of marijuana, possession with intent to distribute, and conspiracy to commit these offenses. In a non-jury trial in April 1977, petitioners and Forsythe were found guilty of the two conspiracy charges, and the court dismissed the substantive offenses. Appeals from these convictions are pending in the court of appeals (Pet. App. 4a).

his privilege against self-incrimination and refused to answer two other questions: "Where had you gotten that * * * marijuana" and "Where were you taking that load of marijuana" (May 24, 1977, G.J. Tr. 2-4).[2] Chitty was given use immunity pursuant to 18 U.S.C. 6002 and ordered by the district court to testify (Pet. App. 13a). When Chitty again refused to answer the two questions, he was held in civil contempt pursuant to 28 U.S.C. 1826(a) and was ordered confined until he purged himself (Pet. App. 14a).

Petitioner Postal appeared before the grand jury on July 12, 1977. He also invoked his privilege against self-incrimination and refused to answer the question "how much did you have invested in the marijuana found aboard [the seized vessel]" (July 12, 1977, G.J. Tr. 3). Postal was granted use immunity; when he continued to refuse to answer the question, he was held in civil contempt and ordered confined.

The court of appeals affirmed in both cases. It concluded that the compelled testimony would not create any reasonable danger of prosecution of petitioners by Colombia, and it therefore did not decide whether the existence of such a danger would have been a sufficient excuse not to answer.[3]

[2]At petitioners' trial the prosecution "contended that, when apprehended, petitioners were bringing the marihuana into the [United States] from Colombia, South America. The logs and charts of the vessel * * * indicated it had recently come from Rio Ocha, Colombia, [but petitioners] contended they were not on their way toward the [United States] * * * and were not attempting to bring the marihuana into [this country]" (Pet. 3).

[3]The grand jury's term expired on January 6, 1978, and petitioners were released. But the United States Attorney intends to request another grand jury in the near future to question petitioners. Accordingly, we do not suggest that this case is moot.

ARGUMENT

Petitioners argue that a witness can refuse to testify, despite receiving use immunity, when the testimony may be used against him in a subsequent foreign prosecution. This is an important problem, which this Court must eventually address. But here, as in *Zicarelli* v. *New Jersey Investigation Commission*, 406 U.S. 472, there is no need to do so. "[T]he privilege protects against real dangers, not remote and speculative possibilities" (*id.* at 478), and petitioners were "never in real danger of being compelled to disclose information that might incriminate [them] under foreign law" (*id.* at 480).

1. The May 7, 1888, treaty for the "Reciprocal Extradition of Criminals, Between the United States of America, and the Republic of Colombia," provides in Article X: "Neither of the high contracting parties shall be bound to deliver up its own citizens, under the stipulations of this Convention." 26 Stat. 1534, 1538. Both petitioners are citizens of the United States.[4] In *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, this Court concluded that an identical provision in an extradition treaty between the United States and France barred extradition of United States citizens to France. The Court explained (*id.* at 9):

> [T]he Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.

[4]Petitioner Chitty was born in Paris Island, South Carolina, and petitioner Postal was born in Columbia, South Carolina.

Valentine holds that petitioners cannot be extradited to Colombia pursuant to the present treaty, even if the Executive Branch should believe that extradition is in the best interests of the United States.[5] This circumstance disposes of petitioners' assertion that there is a real danger that their testimony could be used against them in Colombia.[6]

2. In any event, petitioners were not asked to give public testimony. Grand jury proceedings are secret, and, if petitioners testify, there would be no substantial risk that a foreign government could obtain their answers. See

[5]As this Court noted in *Valentine*, *supra*, 299 U.S. at 12-13, some extradition treaties, although containing the same provision as the instant treaty with Colombia, also expressly state that the contracting parties "shall have the power to deliver * * * up [their own citizens] if in their discretion it be deemed proper to do so" or that "the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so." The treaty with Colombia does not contain such a provision.

[6]Petitioners state that they were "advised by an Assistant Legal Affairs Advisor of the Department of State [George Lehner] that a review of the records of said Department indicates there have been previous extraditions of [United States] citizens to Colombia for criminal prosecution and, further, that a request by Colombia for extradition under existing treaties would be honored by the United States" (Pet. 10-11). We have been advised by Mr. Lehner that petitioners' recollection of their conversation does not agree with his. Mr. Lehner has advised us that extradition of United States citizens has taken place under certain treaties, but, to the best of his recollection, there has been no extradition of a United States citizen to Colombia under the present treaty. Mr. Lehner also stated that, if such an extradition to Colombia were to take place, it would be in violation of the treaty.

In re Parker, 411 F. 2d 1067, 1069-1070 (C.A. 10), vacated and remanded for dismissal as moot *sub nom. Parker* v. *United States*, 397 U.S. 96:

> Rule 6(e), Fed. R. Crim. P., * * * prevents disclosure of matters occurring before the grand jury unless otherwise ordered by a federal court and since for a court to so order under the circumstances presented in the subject case would defeat one of the purposes for grand jury secrecy, i.e. the encouragement of free disclosure by those who have information of crimes, * * * as well as the court's "promise" of immunity, it cannot be assumed that a court would grant such an order or accordingly that there is a danger of incrimination. By virtue of the application of Rule 6(e) any evidence, inculpatory or otherwise, related by [the witness] during the grand jury proceeding would be unavailable to the Canadian government in either an extradition proceeding in the United States or in a criminal proceeding in Canada. [Footnote omitted.]

Other courts also have held that the secrecy of grand jury proceedings eliminates any substantial danger that immunized testimony would be used by a foreign government. *In re Long Visitor*, 523 F. 2d 443, 447 (C.A. 8); *In re Weir*, 495 F. 2d 879, 881 (C.A. 9), certiorari denied, 419 U.S. 1038;[7] *In re Tierney*, 465 F. 2d 806, 811-812 (C.A. 5), certiorari denied, 410 U.S. 914; *United*

[7]Petitioners contend (Pet. 13-16) that there is a conflict among the circuits because *Vandeyacht* v. *United States*, C.A. 9, No. 75-3290, decided November 24, 1975, rejected the position that the secrecy of grand jury proceedings made the possibility of foreign use of the immunized testimony remote or speculative. But the panel in *Vandeyacht* did not purport to overrule *Weir*, which adopted that position. The *Vandeyacht* opinion is unpublished and therefore does not affect the law of the Ninth Circuit. And it is not inconsistent with *Weir*; the panel simply concluded that it could not determine from the record before it whether the witness had a substantial fear of foreign prosecution (slip op. 1), and it remanded for a hearing on the question, among others, of "[w]hat assurances and methods of supporting them can the government or the court, or both, provide that * * * Vandeyacht's answers to the grand jury questions will not be disclosed to Mexican authorities" (slip op. 2). The panel did not indicate that additional assurances of grand jury secrecy would be unacceptable or insufficient; even if it had disagreed with *Weir*, that would establish, at most, an intra-circuit conflict not requiring resolution by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902.

States v. *Doe*, 361 F. Supp. 226 (E.D. Pa.), affirmed *sub nom. United States* v. *Cahalane*, 485 F. 2d 678 (C.A. 3), certiorari denied, 415 U.S. 989. "The same court which grants immunity is the court which prevents violation of the secrecy" (*In re Tierney, supra*, 465 F. 2d at 811), and there is no reason to believe that petitioners' testimony, given in secret before the grand jury, would ever be made public.[8] Cf. *United States* v. *Yanagita*, 418 F. Supp. 214, 217 (E.D. N.Y.), reversed and remanded on other grounds, 552 F. 2d 940 (C.A. 3).

[8]*In re Cardassi*, 351 F. Supp. 1080 (D. Conn.), supports petitioners' position. But that case has not been followed by any appellate court, and the existence of an aberrant decision by a district court does not indicate a need for review by this Court.

CONCLUSION

The petition for writs of certiorari should be denied.

Respectfully submitted.

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